Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BRIAN T. CHRISTIE,
Petitioner

V.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; SECRETARY OF LABOR; MOUNTAIN SPRING COAL COMPANY

On Petition for Writ of Certiorari To The United States Court of Appeals For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

BRIAN T. CHRISTIE
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35 pp

Questions Presented for Review

I hope my questions explain why justices are the only people that can evaluate the gravity of my case and the imminent dangers coal miners face every day. We do not have a union, lawyers or a safety committee. I believe the coal company is operating outside the law and that the State and Federal government officials are helping them.

1. Can the Court order the enforcement of the laws which coal miners are to have?
2. When Pennsylvania and Federal officials refuse to enforce the mining laws, are they not denying the miners their civil rights under the **Fourteenth Amendment?**
3. When the Administrative Law Judge and other government officials, the company and the customer agree to operate outside the law, is it not an "organized crime"?
4. **Case Law**, can it be constitutional? It was used repeatedly to deny me access to people, records, and was brought to bear on my case as an outside force—even as I proved the mine was operating outside the law.
5. Does the Supreme Court recognize as **"statutory"**, the coal mining laws of Pennsylvania and are we to be protected under the **Fourteenth Amendment** as our civil rights?
6. Does the Court recognize that my **Fifth Amendment** rights were denied by the actions of the Administrative Law Judge?
7. Is **perjury** not a default in all law with penalties of fine and imprisonment?

Parties to Proceeding

Federal Mine Safety and Health Review Commission

Secretary of Labor

Mountain Spring Coal Company

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CODE OF FEDERAL REGULATIONS MINERAL RESOURCES

30 Parts 1 to 99, Revised as of July, 1994

A GUIDE TO MINERS RIGHTS and RESPONSIBILITIES UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1997

Revised 1999

BITUMINOUS COAL MINING LAWS OF PENNSYLVANIA FOR UNDERGROUND MINES

PENNSYLVANIA STATE MINING LAW

Section 290, Paragraph G, Page 110

Roadway & Escape ways

In all mines where the coal seam is less than three and one-half feet in height, such traveling way shall be at least four and one-half feet in height; in all mines where the coal seam is four feet in height, such traveling way shall be at least five feet in height; and the width shall not be less than six feet.

CODE OF FEDERAL REGULATIONS MINERAL RESOURCES

Part 30, Section 75.380, Page 541

Escape ways; bituminous and ignite mines

(d)(1) Each escape way shall be—

(1) maintained in a safe condition to always ensure passage of anyone, including disabled persons.

(3) maintained to at least a height of five feet from the

mine floor to the mine roof, excluding the thickness of any roof support, except that the escape ways shall be maintained to at least the height of the coal bed excluding the thickness of any roof support where the bed is less than five feet;

Federal Code, 75.2, Page 507

Certified or registered.

As applied to any person, a person certified or registered by the State in which the coal mine is located to perform duties prescribed by this part 75

My papers—First Grade Assistant Mine Foremen, Pennsylvania 2286, May 18, 1977.

Federal Code, 75..1710-1, Page 609

Canopies or cabs.

Self-propelled electric face equipment; installation requirements.

(a) Shall be met as follows:

(3) On and after January 1, 1975, in coal mines having mine heights of 48 inches or more, but less than 60 inches

Sampled 60-64 inches full seam.

PENNSYLVANIA LAW

Section 210, Paragraph A, Page 250

...so long as certified assistant mine foreman or certified mine examiners are available in the mine *who are willing to accept the assignment* (italicized in the law book).

Citations

US Court of Appeals for the Third Circuit
No. 01-1124 (see appendix one)

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
Docket No. PENN-2000-23-D (see appendix two)

Letter dated 10/6/2000 from U.S. Department of Labor, Department of Mine Safety and Health Administration (see appendix three)

Basis for Jurisdiction

The Third Circuit Court of Appeals ruling dated 3/21/03 stated that certain issues regarding discrimination under 30 USC § 815 (c) (1) are outside the scope of the court's review (see appendix one).

Filing under Part III, Rule 1 (c)
Discrimination under the 14th Amendment by denying our civil rights to a safe place to work.

State of Imminent Danger for Coal Miners "when" Federal Coal Mine Inspectors Refuse to Enforce the Laws protecting coal miners under the Code of Federal Regulations Part 30, Mineral Resources and the Federal Administrative Law Judges.

The Bituminous Coal Mine Inspectors of Pennsylvania refuse to enforce the Bituminous Coal Mining Laws of Pennsylvania for Underground Mines.

U.S. Constitution
First Amendment
Fifth Amendment
Fourteenth Amendment

Constitutional Provisions

Amendment Fourteen Section 1.— All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

First Amendment
Fifth Amendment
Pennsylvania State Coal Mining Laws
Federal Code of Regulations Part 30
A Guide to Miners Rights
Federal Mine Safety and Health Act of 1977[1]

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1 Section 105 (c)(1) of the Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner... has filed or made a complaint notifying the operator or the operator's agent... of an alleged danger or safety or health violation in a coal or other mine, or because such miner... is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner... on behalf of himself or others of any statutory right afforded by the Act.

30 U.S.C.§ 815(c)(1)

MY CASE

When I made "the choice not to accept" the assignment as mine examiner, I acted within my statutory rights under 75.2. I am certified and registered under the Act, Code Page 507, and § 210, Page 250. See attachments.

Before the hearing, I asked Jude Melick to rule on my Motion to Dismiss the case in my favor since the company would not turn over the records that I requested or permit me to interview their witnesses over the telephone as per the Rules. I was also not provided a copy of my deposition.

I explained they broke the Rules he sent me under discovery and this was against my Fifth Amendment right. Jude Melick said no, and to go on and I would have to testify when the company's attorney questioned me.

The Motion was received by Freda Brakefield, one of the Administrative Law Judge's staff. The Administrative Law Judge denied my request. Case law, I was given fifteen minutes with Mr. Delp and none with Mr. Saddler. I was given no time with their witness, Pennsylvania State Coal Mine Inspector, Paul Eckenrode—he would not give me the interview. He testified for Mt. Spring Coal Company.

During the hearing, Judge Melick and I read the transcript Pennsylvania Law and Federal Law requiring five (5) feet high for travel ways and escape ways. Federal 75.380 and PA 290. I proved the company was operating outside the law and for me to sign the books for the company would be breaking the law. To travel through those areas on a jeep

with my neck problems would be irresponsible on my part, considering the risk of injury. See attachment/accident report. Judge Nelick asked me to get him a report from Dr. Burkett, which I did. The report proved I was correct in all my information. I sent the Court a book for the coal mining laws of Pennsylvania for underground mines. The Court returned the book to me, stating, "This court cannot accept this. Thanks." If everything I sent the Court was to be placed in my case file, why would they return the book to me?

Most of the testimony given by the company's witnesses was a distraction aimed at me in an effort to excuse the company for not obeying the law. But all they did was present themselves as people who come to bear false witness.

I proved through my questioning of the company's witness, Pennsylvania State Coal Mining Inspector, Paul Eckenrode,

(a) that I was the one who called for help.

(b) that he told the company it was me.

(c) that it was to make the company cut the required escape ways that are travel ways five feet high.

(d) that it involved him, his boss another state official, and that the company and they had come to an agreement and called it a non-issue.

(e) they cannot come to an agreement not to cut the required escape ways and travel ways.

(f) He also admitted the company was not given a 702 variance.

(g) I questioned him on not being able to examine the roof conditions in the mine when the company does not mine the roof coal and bony down.

The Administrative Law Judge, Jude Melick, watched as I proved that the company was operating outside of the law.

I believe the Judge did not rule in good faith in my case because not only was he denying the truth, but he also denied the men at the mine a safe place to work. This means not only did the company and their friends discriminate against us, but with the blessing of the Administrative Law Judge and the Review Commission.

When the men are not provided with the required escape ways and travel ways that are five feet high, they are in imminent danger—all the time, every day. Please read the attached accident report. This miner never had a chance, he was denied the required escape way.

Appendix Four

This is denying miners their civil rights under the Fourteenth Amendment. The State and Federal officials will not enforce the laws passed to provide miners a safe place to work.

I believe the Judges in the Third Circuit did not take enough time to review what has happened in this case to realize the imminent dangers the miners must undergo.

This case turned into was we studied in school, about why we have a Constitution and a Bill of Rights.

It was like the Salem Witch Trials. The investigator, John Savine, reported accusations as if it were truth without any due process for me. You cannot defend yourself when you cannot face your accusers.

Appendix Three

It started with me saying, "no" to Mr. Saddler that I did not want to fire boss for him and I did not have to sign the books for him under a law that was passed in 1974 to protect miners that are certified as officers of the State of Pennsylvania for these kind of discharges when a mine is operating outside the law.

All along this journey, the people working to defend the company' s firing me kept throwing case law in my face, even the Judge's from the Third Circuit Court repeated this act.

Case law has stopped or blocked me from due process, it brought to bear outside forces—in this case it was used to block me from records, interviews and from cross-examining people who made statements about me. I believe this is obstruction of justice. Case law cannot be constitutional.

In May, 2001, the Courts said I was a person In Forma Pauperis, but I was not provided an attorney. I am the victim, not the criminal. I believe the Fourteenth Amendment gives me the same protection of the law as the rich and powerful.

The more that was tried to be covered up, the more was exposed—like an onion with many layers. At the mine, nothing has improved, the Federal Mine Inspector's boss in Kittanning, Pennsylvania said, "There are still no cabs or canopies on the equipment and no escape ways that are five feet high for the miners that are still working in the mine. Mr. Eckenrode no longer inspects the mine and is under investigation for the false certification of miners that are not qualified to be certified; he sat on the Board of Examiners—he is the State Inspector that testified for the coal company.

The mine foreman, Daryl Shay is no longer at the mine. The face boss, Walter Delp (a witness for the coal company), is also no longer at the mine. Other state officials have been shifted around.

John Savine is no longer an investigator for the Federal Mine Inspectors. He is the one that would not testify and called me at my home. He sent me the fax about the medical evaluations.

When the State and Federal Mine Inspectors refuse to enforce the laws that were passed to protect miners or the Administrative Law Judges work with the coal companies by diluting the laws that were passed to protect the miners, the miners get hurt, the power companies burn dirty coal and we have increased air pollution.

The corruption is going unchecked and spreading like a cancer that tears away the very foundation of our country, society and our Constitution.

MY REASONS FOR GRANTING WRIT

The best reasons I believe that my Writ should be granted are safety of the miners that are still working in imminent danger, and we are still being discriminated against and our civil rights have been denied as citizens and as coal miners.

Miners are denied their civil rights when State and Federal officials refuse to enforce the existing laws to protect and promote the miners' Health and Safety.

Inspectors are to police the mines. Judges are to administer penalties to guilty parties.

Perjury, lies, distortions and opinions do not belong in a court room.

We cannot and I did not have the protection of the Fifth Amendment when these forces are brought to bear.

Escape ways are to be five feet high according to the law. To operate a mine without them is to condemn the miner to imminent danger.

I will not sign the books of the company when they are operating outside the law.

I, Brian Thomas Christie, believe this case warrants your review. It reveals my Fifth Amendment rights were violated and my Fourteenth Amendment rights were violated along with the rest of the miners when the State and Federal officials do not enforce the existing laws that were passed to protect the safety of miners. We are being discriminated against.

We do not have a union to support us or protect us. We do not have a safety committee, or a team of lawyers or money—but we do have the Constitution, a Bill of Rights and the Supreme Court of the United States of America to protect us from discrimination. I pray the Court confirm my plea.

Respectfully Submitted,

Brian Thomas Christie

Brian Thomas Christie
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(724) 295-9153

Appendix One

UNREPORTED—NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-1124

BRIAN T. CHRISTIE,
Petitioner

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION; SECRETARY OF LABOR; MOUNTAIN SPRING COAL COMPANY,
Respondents

On Petition For Review of a Final Decision
By the Federal Mine Safety and
Health Review Commission

Submitted Under Third Circuit LAR 34.1(a)
March 21, 2003
BEFORE: SLOVITER, RENDELL, and WEIS
CIRCUIT JUDGES
Opinion Filed: March 21, 2003

OPINION

PER CURIAM.

This case is a petition for review of a decision of the Federal Mine Safety and Health Review Commission ("FMSHRC" or "Commission"). *Pro se* appellant Brian T. Christie seeks review of the Commission's adverse decision on his discrimination complaint in which he alleged that appellee Mountain Spring Coal Company ("Mountain Spring") discharged him in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815 (c)(1).[1] For the reasons that follow, we will deny review.

At the time of the alleged discrimination, Christie was a coal miner employed by Mountain Spring. Following time off work for a knee injury, Christie returned to the mine on July 30, 1999, upon a doctor's release to "full duty" without restrictions. Mine superintendent Siebert Saddler asked him whether he wanted to resume performing fireboss inspection duties, and Christie told him he did not want to do so. According to Christie's account, fireboss inspection involved traveling in a jeep in thirty-six to forty-one inch height coal and would necessitate twisting his neck, aggravating and injury he

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1 Section 105 (c)(1) of the Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner... has filed or made a complaint notifying the operator or the operator's agent... of an alleged danger or safety or health violation in a coal or other mine, or because such miner... is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner... on behalf of himself or others of any statutory right afforded by the Act.

30 U.S.C.§ 815(c)(1)

sustained in a motor vehicle accident several years before his employment with Mountain Spring. On July 31, 1999, Christie told the face boss , Walter Delp, that he did not wish to fire boss. On August 2, 1999, Saddler suspended him with the intent to discharge because Christie would not fireboss the mine. Christie was later discharged. On August 2, 1999, Christie filed his complaint with the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"). After investigation, the MSHA concluded that a violation of section 105(c) of the Act had not occurred.

Christie filed a complaint with the FMSHRC, alleging that Mountain Spring discharged him in violation of section 105(c) of the Act. A hearing was held before an Administrative Law Judge ("ALJ"). After considering the testimony and exhibits submitted by the parties, the ALJ dismissed Christie's complaint on November, 17, 2000, having determined that Christie had not met his burden of proving his claim. On December 22, 2000, the Commission denied Christie's request for discretionary review. The ALJ's decision became the final decision of the Commission, 30 U.S. C.§ 823(d)(1).

Christie filed a timely petition for review in this court. We have jurisdiction under 30 U.S.C. § 816 (a)(1) and our review of the Commission's final decision is based upon the record of administrative proceedings. The Commission's findings on factual issues are conclusive on a reviewing court if supported by substantial evidence on the record as a whole. Id.

A miner's refusal to work constitutes protected activity under the Act if the miner has a reasonable, good faith belief that the working conditions threaten his safety or health. See Consolidation Coal Co. v. Marshall, 6663 F.2d 1211, 1217 n.6 (3d Cir. 1981). Accord, Leeco v. Hayes, 9665 F.1081,1084 (D.C Cir.1992).

Where reasonably possible to do so, the miner refusing to work is ordinarily required to promptly report the health or safety concern to his employer. Miller v. Federal Mine Safety & Health Review Comm'n, 687 F.2d 194, 196-197 (7th Cir. 1982); Simpson v. Federal Mine Safety & Health Review Comm'n, 842 F2d 453,459 (D.C. Cir. 1988). The issues presented are whether Christie's refusal to perform fireboss duties was an activity protected under section 815 (c)(1), and whether he communicated his health concerns as the reasons for his work refusal.

The ALJ concluded that Christie failed to communicate that his refusal to perform duties of a fire boss was because of his pre-existing neck injury. In his decision, the ALJ stated that Christie acknowledged at the hearing that he did not communicate that the reason for refusing to fire boss, and that Christie testified only that he thought that Saddler was aware of his neck injury based on he pre-employment physical examination and should have deduced that the neck pain was the cause for Christie's refusal. The ALJ also noted that neither Christie's pre-employment physical nor his "return to work" certificate completed by a physician placed any restriction on his return to work as an underground miner. In addition, the ALJ credited Saddler's testimony that when he asked Christie to perform firebossing duties, Christie never mentioned any neck injury or pain. Furthermore, the ALJ noted that Christie alleged for the first time at the hearing that when he told Saddler he did not want to fireboss on that basis. We have carefully considered the parties' briefs, including Christie's interpretations of the evidence presented at the hearing. We conclude that the ALJ's factual findings are supported by substantial evidence.

At the hearing, Christie testified that his neck injury was the reason he refused to perform the fire boss inspections. Both Christie's own testimony and Saddler's testimony indicate that Christie did not communicate that reason to Saddler. Christie's contention that Saddler should have inferred the reason for his work refusal based on his pre-employment physical is belied by that document, as well as by the certificate to return to duty without restrictions. [2] We agree with the ALJ's conclusion that Christie failed to establish that he was fired in retaliation for his refusal to perform work posing a hazard to his neck injury.

Christie raises several issues regarding the conduct of discovery and the conduct of the administrative hearing. First, Christie states that Mountain Spring did not provide requested documents or allow interviews with company witnesses. The record reflects that the ALJ heard and ruled upon each of Christie's discovery issues appropriately. We discern no error. Second, Christie seems to contend that the ALJ should not have compelled him to answer the questions of Mountain Spring's counsel, that is , that his testimony should not have been subject to cross-examination. In support, Christie asserts that he did relinquish his Fifth Amendment rights, and that under Rule 32(a)(3) of the Federal Rules of Civil Procedure, his deposition should not have been used against him because he was representing himself during the administrative proceedings.

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[2] Moreover, in his statement to the MSHA investigator, dated ten days following his discharge, Christie state, "I told Saddler I had no obligation to fire boss or sign the books for him. It was up to me if I used my [assistant mine foreman] papers, not him. I just wanted to be a bridge operator and work on the section. I just did not wand to fire boss and that is what I tried to tell him...I did not make any specific safety complaints at the time.

These contentions are without merit. Christie stated that he did not want to answer Mountain Spring's questions because he did not want to be "tripped up." It does not appear that Christie raised his Fifth Amendment right to protection from compulsory self-incrimination. In addition, the ALJ did not compel Christie's testimony during cross-examination. Rather, the ALJ advised Christie of the possible consequences of refusing to submit to cross-examination, and Christie agreed to answer Mountain Spring's questions. Moreover, Rule 32(a)(3) does not stand for the proposition advanced by Christie. The selective portion of Rule 32 (a)(3) relied upon by Christie, providing that "a deposition...shall not be used against a party who...was unable...to obtain counsel to represent it...," applies only to a situation where a deposition is taken without leave of court under Rule 30(a)(2)(c), and the person examined is about to leave the country and will be unavailable thereafter. Christie cannot claim benefit from Rule 32(a)(3) merely because he proceeded through the administrative case *pro se.*

Finally, Christie make allegations regarding Mountain Spring's non-compliance with state and federal mining laws, and he asks this court to enforce various mining laws. Christie also alleges that Mountain Spring and the state mine inspectors colluded together to allow the coal company to violate laws regarding mine height, noting that Mountain Spring has not received any violations for not cutting the escape ways to a certain height. These issues are outside the scope of this Court's review of the Commission's decision on Christie's complaint of discrimination under 30 U.S.C. § 815 (c)(1).

For the foregoing reasons, we will deny the petition for review. Mountain Spring's motion to dismiss the petition pursuant to 28 U.S.C. § 1915(e)(2)(A) is denied.

Appendix Two

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

BRIAN T. CHRISTIE, PROCEEDING	: DISCRIMINATION
Complaint	:
	: Docket No. PENN 2000-23-D
v.	
MOUNTAIN SPRING COAL COMPANY	: No. 1 Mine
Respondent	: Mine ID 36-08725

DECISION

Appearances: Brian Christie,
Worthington, Pennsylvania
pro se

Julie K. Shreve, Esq.
Jackson & Kelly, P.L.L.C.
Charleston, West Virginia
on behalf of Respondent

Before: Judge Melick

This case is before me upon the Complaint by Brian T. Christie, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq,* "the Act", alleging that he was discharged by Mountain Spring Coal Company (Mountain Spring) on August 2, 1999 presumably in violation of Section 105(c)(3) ot the Act[1].

Christie alleged in this initial complaint filed on August 3, 1999, with the Department of Labor's Mine Safety and Health Administration (MSHA) as follows:[2]

1) Superintendent trying to force me to take vacation for injury instead of compensation.[3]

2) Superintendent asked me if I wanted to fire boss again on 7/30/1999 and wanted answer on 7/31/1999. On 7/31/1999 I told the face boss Walter Delt I did not wish to fire boss.

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1 Section 105 (c)(1) of the Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner... has filed or made a complaint notifying the operator or the operator's agent... of an alleged danger or safety or health violation in a coal or other mine, or because such miner... is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner... has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner... on behalf of himself or others of any statutory right afforded by the Act.

2 In a letter dated October 6, 1999, MSHA concluded that a violation of Section 105(c) of the Act has not occurred. Mr. Christie thereafter requested relief from this Commission.

3 In his subsequent statement for MSHA investigator, John Savine, on August 12, 1999, Christie acknowledged that he had by that time received all Worker's Compensation to which he was entitled (C-3, p.3).

In a statement to MSHA special investigator, John Savine, on August 12, 1999, Mr. Christie stated that ' I believe I would not have been fired if I would have agreed to fire boss" and at hearings testified that he was discharged because he refused to fire boss on July 30, 1999. These proceedings are limited to considerations of those allegations.

Mr. Christie seeks reinstatement and damages, including back pay and reimbursement of medical expenses. However, since he claims that because of his limited functional capacities from a pre-existing medical condition, he must be exempted, in any reinstatement order, from working as a fire boss and from operating any equipment such as a roof bolter or power scoop which could aggravate the pain in his neck. Indeed, it appears that the only job that Mr. Christie would accept in reinstatement would be that of a bridge operator.

This commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of production and proof that he engaged in protected activity and that the adverse action complained of was motivated in any part by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Secretary on behalf of Pasula v. Consolidated Coal Co,* 2FMSHRC 2786, 2797-2800 (1980) rev'd on grounds, *sub nom; Consolidated Coal v. Marshall,* 663 F2d. 1211 (3rd Cir. 1981)*; and Secretary on behalf of Robinette v. United Castle Coal Co.,* 3FMSHRC 803, 817-18 (1981). The operator may rebut the *prima facie* case by manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra,* See also *Eastern Assoc.Coal Corp. v.*

FMSHRC, 813 F.2d 639,642 (4th Cir. 1987*); Donavan v. Stafford Construction Co.,* 732 F.2d 194,195-196 (6th Cir. 1983) *(*specifically approving the Commission's *Pasula-Robinette* test). FD.NLRB v. *Transportation Management Corp.* 462 U.S. 393,397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

A miner's refusal to perform work is protected under the Act, if it is based upon a reasonable, good faith belief that the work involves a hazard. *Pasula, supra* 2 FMSHRC at 2789-96; *Robinette, supra,* 3 FMSHRC at 807-12; *Secretary v. Metric Constructors, Inc.*766 F.2d 469,572-73 (11th Cir. 1985); see also *Simpson v. FMSHRS*, 842, F.2d 453,458 (D.C Cir. 1988); *Consolidation Coal Co. v. FMSHRC*, 795 F. 2d 364, 366 4th Cir. 1986). It is further required that "where reasonably possible, a miner refusing work should ordinarily communicate...to some representative of the operator his belief in the safety or health hazard at issue." *Secretary on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982); see also *Simpson v. FMSHRC*, supra 842 F.2d at 459 *Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1074 (July 1986), aff'd mem., 829 F.2d 31 (3rd Cir. 1987) (table cite).

Christie had been off work and receiving workers' compensation from April 21 through May 10, 1999 because of a knee injury and again from June 25 through July 29, 1999, because he re-injured that knee. According to Christie, he reported back to work on July 30, 1999 to "full duty" upon the doctor's release without any restrictions (EXH C-3, pp2-3). Christie testified that mine superintendent Seibert Saddler had asked him on July 30th to perform fireboss duties and that he told him that he did not want to do it. He explained at the hearing that performing

the duties of a fire boss, traveling in a Jeep in 36 to 41-inch height coal would necessitate twisting and wrenching his neck which was painful. According to Christie, Saddler knew the history of his neck injury and pain and based on his pre-employment physical exam he should have accepted him with his work limitations. [4] Christie also admitted, however, that even if he was reinstated he would not be able to perform the duties of a fire boss, nor could he operate a power scoop or roof bolter because of his neck pain. Indeed, he testified that the only work he could perform at the mine was that of bridge operator. He maintains that is unable to ride into the mine in a sitting-up position and even riding in a Jeep "would be a problem."

The narrow issue presented herein is whether Mr. Christie's refusal to perform duties as a fire boss was a protected work refusal. [5] Even assuming *arguendo*, that Christie entertained a good faith and reasonable belief that to perform the duties of fire bossing would have been unsafe because of his pre-existing neck condition, for a work refusal to be protected, the minor must first communicate his safety concerns to some representative of the operator.

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4 The pre-employment exam report shows, however, that Christie had no physical or mental limitations related to work as an underground miner. (Exh., C-1).

5 At hearings, Christie also appeared to allege for the first time that after he told Saddler that he did not want to fire boss, Saddler offered to have him perform only partial fire boss inspections, but then sign the fire boss books as if he had completed the inspection—an unlawful procedure. This allegation had never previously been made either in his complaint filed herein or the lengthly and thorough interview by the MSHA investigator. Saddler also denied the allegation in his testimony at hearings. Under the circumstances, I do not find this new allegation to be credible.

Secretary on behalf of Dunmire, 4 FMSHRC at 133. In this regard, the Commission has held that "proper communication of a perceived hazard is an integral component of a protected work refusal and responsibility for the communication of a belief in a hazard underlying the work refusal lies with the miner." Conaster, 11 FMSHRC at 17, citing Dillard Smith v. Reco, Inc., 9FMSHRC 992 at 995-96 (June 1987). The miner's failure to communicate his safety concern denies the operator an opportunity to address the perceived danger and, if permitted, would have the effect of requiring the Commission to presume that the operator would have nothing to address the miner's concern. Thus, a failure to meet the communication requirement may strip a work refusal of its protection under the Act.

In this Case, Mr. Christie, in his statement to investigator Savine and at hearings, acknowledged that he did not communicate that his refusal to perform the duties of a fire boss was because of his pre-existing neck injury. Christie testified only that he thought Saddler knew of the history of his neck injury and the pain associated with that injury based on his pre-employment physical exam and presumably should therefore have known the reason for his refusal to fire boss. However, as previously noted, neither his pre-employment physical nor the doctor's release on July 29, 1999, placed any restrictions on Christie's return to work as an underground miner. Indeed, it is uncontradicted that Christie was released by a physician to "unrestricted duty" upon his return to work only a few days earlier (Respondent's Exh. No.2) and that Christie himself admitted in his August 12, 1999 statement that he had been released by the doctor on July 29, 1999 to full duty without restriction (Exh. C-3). In addition, Saddler testified credibly that when he asked Christie to do the

fire bossing, Christie never mentioned any neck injury or pain or anything about putting his papers in jeopardy.

Under the circumstances and even assuming, *arguenda*, that Christie retained good faith and reasonable belief that to work with his neck pain was a safety hazard, he cannot prevail under a "work refusal" theory because of his failure to communicate that as a reason for his refusing to perform the duties of a fire boss. In any event, I do not find that the work refusal in this case based on the impairment claimed in this case is protected by the Act. Here, Christie alleged neck pain caused by a non-work related vehicular accident several years before he ever began employment with Mountain Spring. It is an idiosyncratic physical impairment not involving inherently unsafe working conditions and practices of the mine operator. See e.q., Paula Price v. Monterey Coal Company, 12 FMSHRC 1505 at 1519-1520 (August 1990), (concurring opinion); Sam Collette v. Boart Longyear Co., 17 FMSHRC 1121, 1125-26 (July 1995) (ALJ) and Perry v. Phelps Dodge Morenci, Inc., 18 FMSHRC 643 (April 1996) (ALJ). This case does not present the "appropriate circumstances" mentioned in Bjes v. Consolidation Coal Co., 6 FMSHRC 1411, 1417 (June 1984), in which a miner may refuse to work on the basis of a perceived hazard arising from his own physical condition.

Christie also claimed that he refused to perform fire boss duties because "Saddler would not run the mine the way it was supposed to be run" (Tr. 126). He admits, however, that he did not communicate the reason to Saddler. In light of this admission, Christie likewise could not prevail under a "work refusal" theory. Conaster, 17 FMSHRC at Dillard Smith, 9 FMSHRC at 995-96. Since Christie admits moreover that he could not in any event perform the

duties of a fire boss because of his neck pain, this claim could not provide a good faith and reasonable belief basis for work refusal.

Under the circumstances, Mr. Christie has failed to sustain his burden of proving that he was discharged in violation of Section 105(c) of the Act and accordingly, his complaint must be dismissed.

Appendix Three

U.S. Department of Labor
Mine Safety and Health Administration
4015 Wilson Boulevard
Arlington, Virginia 22203-1984

October 6, 2000

Mr. Brian T. Christie
R.D. 1 Box 308
Worthington, Pennsylvania 16262

Dear Mr. Christie:

This is in response to your Freedom of Information Act (FOIA) request forwarded from Joseph J. Garcia, District Manager, Hunker, Pennsylvania, for information contained in the Mine Safety and Health Administration's case, PITT-CD-99-05, Brian T. Christie v. Mountain Spring Coal Co.

A review of the requested case information was conducted by the Technical Compliance Investigation Division (TCID). Some of the information concerning you, which you are provided or of which you are generally knowledgeable, is enclosed. Other requested information is enclosed under the FOIA without charge, except as explained below (23 pages deleted),

Information, including statements, the disclosure of which could reasonably be expected to divulge the identities of confidential sources, is withheld under Exemption 7(D) of the FOIA. The purpose of this exemption is to prevent disclosure of information which could subject sources to harassment and intimidation. Disclosure would make it harder to conduct

future investigations because individuals would be reluctant to come forward with necessary information if their identities were to be disclosed.

Some information is withheld from public disclosure under Exemption 7(C) of the FOIA protecting information which, if disclosed, could reasonably be expected to constitute an unwarranted invasion of privacy. This investigatory information is of a personal nature and disclosure could compromise sources. Predecisional materials, including staff conclusions and opinions, are withheld under Exemption 5 of the FOIA which protects internal deliberations.

You may file an appeal of the partial denial regarding TCIS records with the Solicitor of Labor within 90 days of your receipt of the enclosed information. The appeal must be addressed to the Solicitor of Labor, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington DC 20210, and must state in writing the grounds for appeal, including any supporting statements or arguments.

Appendix Four

Commonwealth of Pennsylvania
Department of Environmental Protection

BUREAU OF DEEP MINE SAFETY
FINAL ACCIDENT INVESTIGATION REPORT

Date of Report:	April 6, 2000
Division:	Bituminous
Facility:	Underground District 8
Inspector:	Paul Eckenrode
Mine Information:	
Company:	Mt. Spring Coal Co.
Mine:	Mine #1 ID 36-08725
County	Beaver County, PA
Address:	PO Box 322 Shippingport, PA 15077
Seam:	Upper Freeport
Seam Thickness:	42"

Last Year Accident Frequency

Management Information:

Manager:	Siebert Saddler
Supt.:	Siebert Saddler
Mine Foreman:	David Chambers
Supervisor:	N/A
Mine Elec.:	William Workman
Safety Director:	N/A

Labor Information:
Labor Organization: N/A
Chairman H&S Committee

Injured Employee Information:
Name: Michael Guappone
Title: Laborer
Certifications: MC & MR Age: 32

Injury Information:
Degree: Hospitalization Type: Other
Body Part: Head Source: Roof Bolt

Job Information:
Title: Laborer
Activity: Riding
Experience on Job: 10.5 years
Date Hazard Trained: 11/5/1999

Accident Information:
Date: 4/4/2000 Time: 1:14 am
Type: Struck against Class: Other
Location: Intake Escape way
Mining Method: Other Body Activity: Sitting
Type of Equip: Jeep

Description of Accident:
Victim was passenger on a MAC-8 personnel carrier that was transporting men out of the mine at the end of the afternoon shift. The average height just in by the accident scene averaged approximately 44". As the personnel carrier passed through an area of roof height averaging approximately 35", the victim's head jammed into the roof, scraping his forehead across a 6" by 16" bearing plate. The resulting injury was avulsion of the forehead requiring 40 staples.

Conclusion:

The victim failed to properly position himself on the personnel carrier to avoid coming in contact with the mine roof. The victim also failed to stay alert to changing heights and other hazards associated with riding a personnel carrier through close clearance areas.

Recommendations:

- Personnel carriers on all power equipment should travel as safe speed consistent the condition of roads and type of equipment used.
- Persons should always face the direction of travel keeping a constant watch for hazards such as low clearance areas and obstacles in the roadway
- Hazards such as height changes and other obstacles should be clearly marked or eliminated, if possible.

Appendix Five

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1124

Christie v. Federal Mine Safety and
Health Review Commission

TO: Clerk

1) Motion for Leave to Proceed In Forma Pauperis

The foregoing Motion is granted.

For the Court,

/s/ Marcia M. Waldron
Clerk

Dated: June 5, 2001
Received and Filed
June 6, 2001
Marcia M. Waldron, Clerk